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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1462

SAM ALTA DRYDEN and RAY BUEIEW HUTCHESON,
Petitioners,

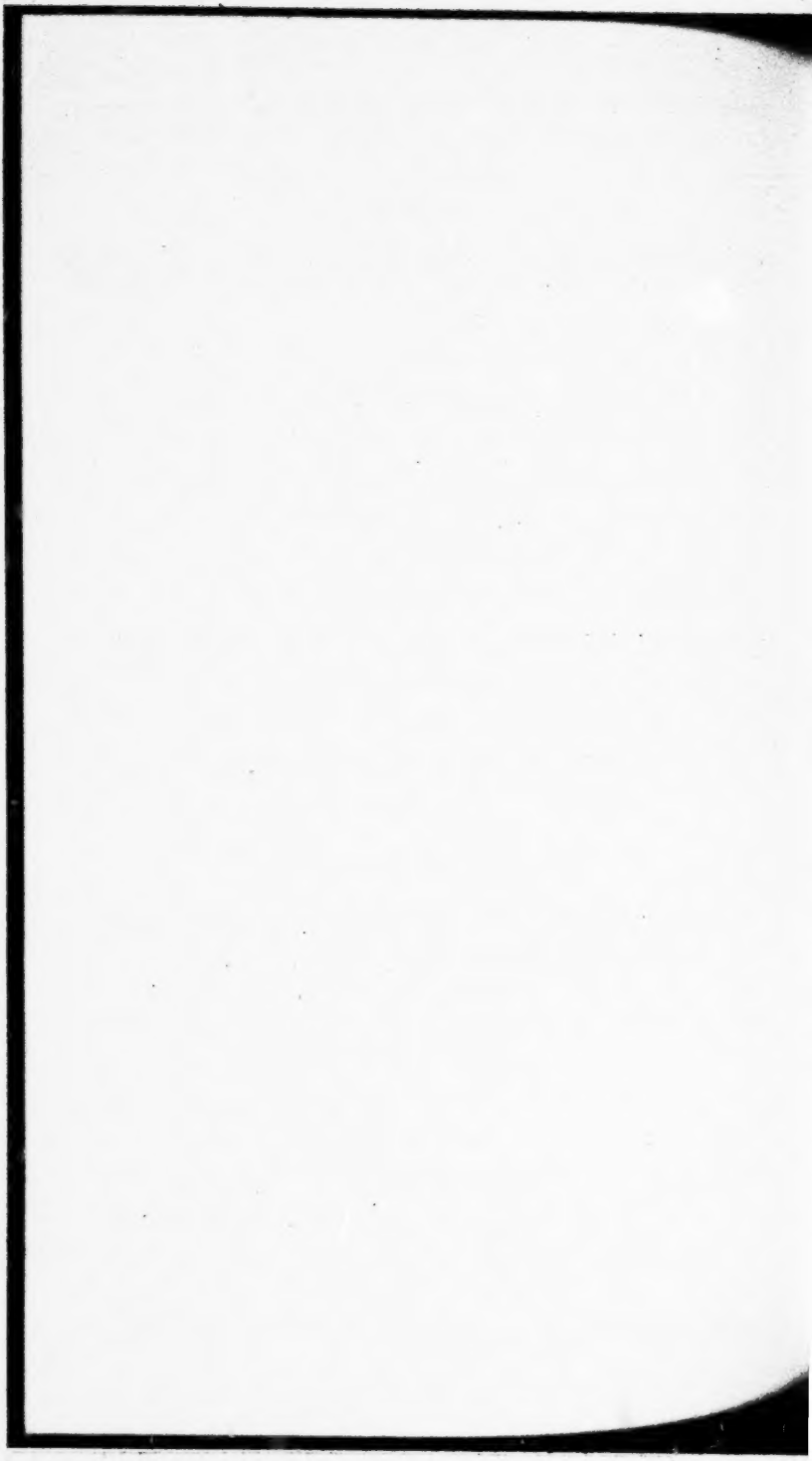
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT B. THOMPSON
P. O. Box 677
Gainesville, Georgia
Attorney for Petitioners

R. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030



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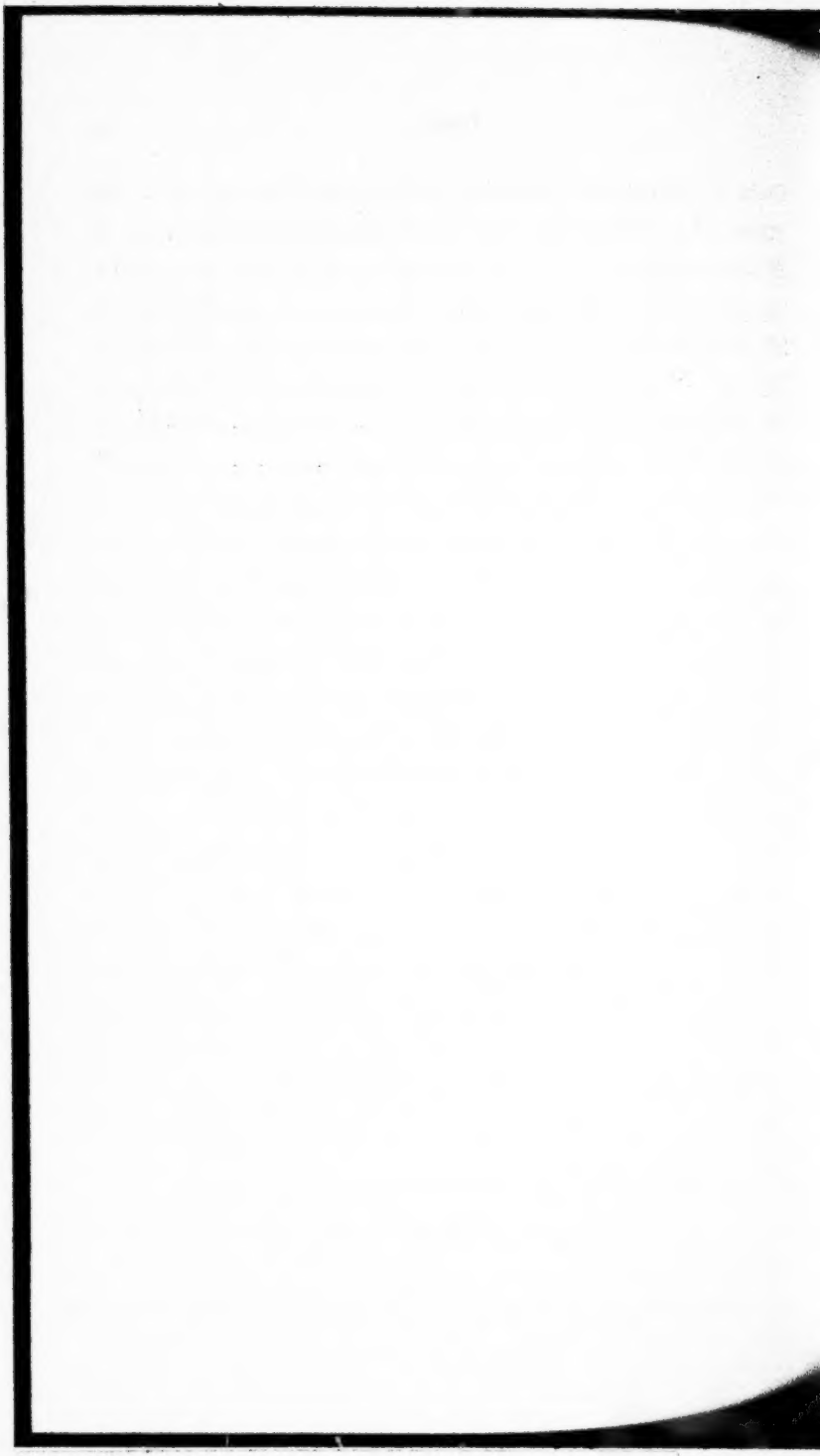

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case was published March 23, 1970, and is reported in ..... F.2d ..... It is captioned *United States of America,* Appellee v. *Sam Alta Dryden and Ray Bueiew Hutcheson,* Appellants. A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The decision of the United States Court of Appe for the Fifth Circuit sought to be reviewed here is n published in the official reporter as yet. It is entitl *United States of America* v. *Sam Alta Dryden and R Bueiew Hutcheson,* No. 27,169, and is dated March 1970. The court below entered an order staying its ma date for a period of 30 days from March 23, 1970, to a including April 22, 1970, pending the filing and ultima disposition of this petition for writ of certiorari.

The jurisdiction of this Court is invoked under USC 1254(1), and under and by virtue of Title 18, US 3772, within the time provided for in Rule XI and Ru 22(2) of the Rules of Practice and Procedure of the S preme Court of the United States.

Jurisdiction of this Court is invoked because the Unit States Court of Appeals for the Fifth Circuit has decid important questions of federal law of gravity and i portance in the administration of criminal justice whi have not been but should be settled by this Court. It h decided an important and significant question of Co stitutional law contrary to the decisions of this Court a has refused to follow the precedents of this Court on th Constitutional issue. The decision of the Fifth Circu Court of Appeals in this case on substantial issues is co trary to decisions of the United States Circuit Courts Appeal, so that the law as applied in the Fifth Circuit no differs from that applied in other Circuits. In its rulin the Court has so far departed from the accepted and pr scribed course of judicial proceedings so as to require t exercise of this Court's power of supervision to corr the errors inherent in its decision.

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(c)

QUESTIONS PRESENTED

1.

Do the statutory requirements for the registration and posting bond in respect of the manufacturing of distilled spirits, 26 USC 5171, 5172, 5173 and 5179, violate the privilege against self incrimination guaranteed by the Fifth Amendment to the Constitution of the United States?

2.

Is it a violation of due process of law for federal officers to prevent counsel for defendants in a criminal case to interview a material witness for the prosecution prior to trial, and does such interference deprive the defendants of due process of law and a fair trial?

3.

Should evidence of prior convictions and associations of criminal defendants be admitted in evidence against them as probative of their guilt on the trial for specific offenses charged against them and for which they are on trial?

4.

Where the evidence in a federal criminal conspiracy trial would permit a finding of fact that multiple conspiracies existed, one of which was not within the venue of the trial court and a finding of the existence of such multiple conspiracies would authorize an acquittal as to one of the defendants, should such factual issue be submitted to the jury?

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fifth Amendment to the Constitution of the United States, provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The relevant portion of the Sixth Amendment to the Constitution of the United States, provides:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Title 26, Section 5171(a), United States Code:

> "Every person shall, before commencing or continuing the business of a distiller, bonded warehouseman, rectifier, or bottler of distilled spirits, and at such other times as the Secretary or his delegate may by regulations prescribe, make application to the Secretary or his delegate for and receive notice of the registration of his plant. No plant shall be registered under this section until the applicant has complied with the requirements of law and regulations in relation to the qualification of such business (or businesses)."

Title 26, Section 5172, United States Code:

> "The application for registration required by section 5171(a) shall, in such manner and form as the Secretary or his delegate may by regulations prescribe, identify the applicant and persons interested in the business (or businesses) covered by the application, show the nature, location and extent of the premises, show the specific type or types of operations to be conducted on such premises, and show any other information which the Secretary or his delegate may by regulations require for the purpose of carrying out the provisions of this chapter."

Title 26, Section 5173(a), United States Code:

"Every person intending to commence or to continue the business of a distiller, bonded warehouseman, or rectifier, on filing with the Secretary or his delegate an application for registration of his plant, and before commencing or continuing such business, shall file bond in the form prescribed by the Secretary or his delegate, conditioned that he shall faithfully comply with all the provisions of law and regulations relating to the duties and business of a distiller, bonded warehouseman, or rectifier, as the case may be (including the payment of taxes imposed by this chapter), and shall pay all penalties incurred or fines imposed on him for violation of any of the said provisions."

Title 26, Section 5179(a), United States Code:

"Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section)."

(e)

STATEMENT OF THE CASE

Petitioners were indicted in the United States District Court for the Middle District of Alabama in a single count, charging a conspiracy to violate the Internal Reve-

nue Laws relative to distilled spirits. The objectives of the charged conspiracy were to possess unregistered distilleries; to remove, deposit and conceal distilled spirits with intent to evade payment of tax; and to carry on the business of distillers without giving bond. The liquor business described in the indictment involved the possession of unregistered and unbonded distilleries in Mississippi, Alabama and Georgia. A pre-trial motion to dismiss the indictment on the grounds here urged was overruled.

The facts disclosed by the evidence in this case are somewhat complicated and prolix. We doubt that it would serve any useful purpose to recite them in great detail. However, we shall attempt to relate them sufficiently to supply a narrative of events and to place them in proper context so as to illustrate the errors hereinafter urged.

Herrin, the first government witness, lived in Hattiesburg, Mississippi, in 1967. In May of that year he was contacted by Godwin, who was attempting to locate some whiskey. During their conversation, Godwin discussed the possibility of their making some whiskey. A week or ten days later Godwin returned with Appellants, at which time they discussed a contact with Broadus, through whom whiskey might be obtained, and the possibility of setting up a distillery for making whiskey. Pursuant to the conversation, Herrin later located a place where a distillery could be set up, and he notified Hutcheson by telephone. The latter agreed to send him $1000 to get started with. This was done and Herrin began purchasing appropriate material for the desired purpose. He hired some help, made purchases, bribed the local sheriff and otherwise set the project in motion.

While matters were thus in progress, Godwin alone and Godwin with Dryden visited with Herrin and dis-

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cussed the progress which was being made. On one occasion Godwin brought two 500 gallon tanks and some jugs. Also, Herrin called Hutcheson a number of times. Pursuant to one such call, Dryden and Hutcheson brought Herrin $3000. The distillery was found by the law before any production began and thereafter a portion of the money was returned to Hutcheson. Herrin was arrested on May 25th. At that time, or shortly thereafter, he called Hutcheson again. Hutcheson told him he would be down on May 29th. On the latter date the two of them, Hutcheson and Herrin, looked for another location to set up a distillery. Hutcheson picked up the 500 gallon tanks. During the visit, Hutcheson offered Herrin a job.

Sometime in April or May, 1967, Herrin called Dryden about some whiskey which was ready for him through Broadus. Herrin had made the contact with Broadus, apparently as a result of his original contact with Godwin.

In May, 1967, Godwin contacted Adams at Cedartown, Georgia, and asked him if he wanted a job "tripping liquor from Mississippi." On the same day the two of them went to see Dryden. As a result of this contact, Adams went to Penscagoula, Mississippi, for a truck load of whiskey. Dryden furnished the money to pay for it. The liquor was purchased by Adams and delivered to a point near Wetumpka, Alabama. For the next five months, Adams related, he hauled thousands of gallons of liquor for Godwin and Dryden and had numerous contacts and transactions with them. For present purposes, we think it sufficient to say that it discloses a pattern of conduct indicative of a large liquor distribution operation. There is no indication in this testimony that Hutcheson was involved or was participating in any way during this

period. As a matter of fact, Adams testified that he was transporting the whiskey for Godwin and Dryden.

Thereafter, in November, 1967, Dryden hired Adams to work at a distillery in Cleburne County, Alabama. He worked at the distillery, apparently performing various tasks, from November 8 to November 21, 1967. During that time he had various conversations with Dryden. Some of the conversations took place at Hutcheson's store in Muscadine, Alabama, but Hutcheson was never present during any of them. Adams kept a record of his "transactions." He gave them to Hutcheson in January, 1968 (after the dates alleged in the indictment), at the latter's request. Hutcheson told him he had received no profit and he wanted to know "how much profit was to be made."

Wade Farris was contacted by Godwin in June, 1967, and met with him at a motel in Montgomery, Alabama. Adams was at the motel. He discussed the whiskey business with Godwin. As a result of this contact, the two of them engaged in some whiskey transactions for a period extending into August, 1967. During their association, they discussed setting up a distillery and Farris looked for a place to set it up. After Farris located such a place, arrangements were made to meet for the purpose of looking it over. When they met, Dryden and another man were with Godwin. They inspected the place, but apparently the plans, if any, to set up a distillery there were never developed. Farris testified that while he was working with Godwin he stopped by Hutcheson's store to buy gas. Hutcheson, while he was putting the gas in the car, told him that Godwin would be there in a little while. Shortly thereafter, Godwin arrived. On another occasion Farris met Godwin at the store and followed him from there to a nearby school, where he parked. While

he was there, Hutcheson drove up and told him that a man and two women would be by in a pickup truck and that he should follow them. When the pickup came by, he followed it to a stash, where he loaded up 122 gallons of whiskey. This was taken to Montgomery. On cross-examination, Farris could not recall whether Hutcheson told him that he was delivering the message for Godwin. Hutcheson testified that after Godwin and Farris left his store, Godwin called, said he had a flat tire and asked Hutcheson to go over to the school and deliver a message to Farris. He did this.

REASONS FOR GRANTING THE WRIT

The decision of the court below has decided an important question of Constitutional law in a manner contrary to the decisions of this Court in *Grosso* v. *United States,* 390 U.S. 62; *Marchetti* v. *United States,* 390 U.S. 39; *Haynes* v. *United States,* 390 U.S. 85; *United States* v. *Leary,* 395 U.S. 6; and *United States* v. *Covington,* 395 U.S. 57.

This Court has steadfastly and unwaveringly protected the Sixth Amendment right of an accused to have the assistance of counsel at every critical stage of a criminal prosecution. *Glasser* v. *United States,* 315 U.S. 60; *Mempa* v. *Rhay,* 389 U.S. 128; *Miranda* v. *Arizona,* 384 U.S. 436; *Massiah* v. *United States,* 377 U.S. 201. Yet, in effect, as presented under the record here, in the second question presented, and contrary to the ruling of the United States Court of Appeals for the D.C. Circuit in *Gregory* v. *United States,* D.C. Cir., 369 F.2d 185, the decision of the Fifth Circuit has held, under the circumstances, effective assistance of counsel was not denied where, due to the interference of government officers, Peti-

tioners' counsel was deprived of the right to interview an essential prosecution witness prior to trial.

As we urge under the third question presented here, the use of prior criminal records and prior associations as probative evidence to establish the guilt of one on trial for a specific offense, violates due process of law and denies a fair trial. Its tendency to create hostility, surprise and confusion of issues outweighs any probative value it may have. Such evidence should be excluded where the "minute peg of relevancy will be entirely excluded by the dirty linen hung upon it." *United States* v. *Kahaner*, 2 Cir., 317 F.2d 459, 471. The opinion of the court in the present case is in conflict with prior decisions of that court and other Circuit Courts of Appeal. *United States* v. *Byrd*, 2 Cir., 352 F.2d 570, 574; *Sang Soon Sir* v. *United States*, 9 Cir., 197 F.2d 431; *United States* v. *Harris*, 4 Cir., 331 F.2d 185; *Fallen* v. *United States*, 5 Cir., 220 F.2d 946; *Baker* v. *United States*, 5 Cir., 227 F.2d 376.

Finally, it was contended by Petitioner Hutcheson that the evidence, if accepted by the jury, showed two, rather than one, single conspiracy. He contended that if he were found a party to the first of the two possible conspiracies, but not the second, the trial court was without proper venue to try and convict him, as that conspiracy related solely to events which occurred in Mississippi. Accordingly, he sought to present this factual issue to the jury by his argument and by an appropriate instruction of the trial court to the jury. The court below held that the trial court did not err in submitting this factual issue to the jury. This ruling is contrary to the established law on this issue as recognized by the several Circuit Courts of Appeal, including the Fifth Circuit. *Green* v. *United States*, 5 Cir., 332 F.2d 789; *United States* v. *Varelli*, 7 Cir., 407 F.2d 735, 744; *Lefco* v. *United States*,

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3 Cir., 74 F.2d 66, 69; *Koolish* v. *United States*, 8 Cir., 340 F.2d 513, 536; *United States* v. *Crosby*, 2 Cir., 294 F.2d 928, 945.

Question One

This Court, in its *Grosso, Marchetti, Haynes, Leary* and *Covington* discussions, supra, dealt with the gambling, firearms and marijuana registration and tax laws. We think that the discussion in those cases, both as to law and logic are equally applicable to the registration and bonding statutes relative to the manufacturing of distilled spirits. The conclusion is inescapable.

In order to meet the requirements of 26 USC 5171, 5172, 5173 and 5179, necessary for the operation of a distillery, one is obligated to incriminate himself, just as he would be under the gambling, firearms and marijuana statutes which this Court has considered in its prior decisions.

It is to be noted that under those statutes, before commencing the business of a distiller, one must make application for registration of his plant. 26 USC 5171. The application must identify the applicant and other persons interested in the business; show the location of the same and the type operation to be conducted; and supply such other information as may be required by regulations. 26 USC 5172. After the application is filed, 26 USC 5173 requires that the individual, before commencing business, file a prescribed bond. Every person having in his possession, custody or control a still or distilling apparatus set up, must register it immediately on its being set up, furnishing detailed information required by statute and regulations. 26 USC 5179.

By reference to *Marchetti et al.*, supra, we find a similarity in the statutory scheme relative to distilled

spirits and that relating to wagers. Both are an interrelated statutory system for taxing. While one is a means of taxing wagers, the other is a means of taxing distilled spirits. One requires the registration of the person; whereas, the other requires the registration of a distillery. In each case, the registration must be effected before the business is commenced. The information required of a registrant in each case is rather detailed. A distiller is required to post a sign at the distillery, 26 USC 5180, just as a gambler is required to post his appropriate revenue stamps. As in the case of wagering, compliance with the Internal Revenue Laws relative to distilled spirits does not in any way affect the application or prohibitions of state statutes, nor "exempt any person from any penalty or punishment provided by" state laws. 26 USC 5145.

In making the foregoing comparison, we have followed the discussion contained in the beginning of the *Marchetti* opinion. It fits like a glove. In other words, we submit that there can be no substantial distinction between the two statutory schemes. Further, here, as in *Marchetti,* the question presented does not attack the power of Congress to tax. The issue, as in *Marchetti,* is:

> "whether the methods employed by Congress in the federal (distilled spirits) tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment."

At the outset of its consideration of the question thus presented in *Marchetti,* the Supreme Court observed that wagering, and we relate the same to distilled spirits here, is very widely prohibited under both federal and state law. We pause at this moment to examine what the Court meant by the word "prohibited". From the discussion which followed that statement by the Court, it is appar-

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ent that the word was used in the sense that such activities are either forbidden, limited or regulated. This follows from the statement of the Court which was immediately uttered. That is, its reference to relevant federal statutes, some of which do not forbid gambling, but, in effect, limit the use of interstate facilities in aid of violation of state gambling laws. Furthermore, the *Marchetti* decision was not limited to states where gambling is illegal per se, but is generally applicable throughout the United States. More than this, though, the Supreme Court was impressed with the fact that compliance with the registration statute would cause one to incriminate himself both under state and federal law. *Marchetti,* pages 52-53; *Grosso,* page 66; also see *Haynes* v. *United States,* supra, where possible state self-incrimination was only incidental.

Alabama, one of the states involved in the present indictment, prohibits the manufacture of alcoholic beverages, Code of Alabama, Title 29, Section 103. All three of the states involved here, Mississippi, Alabama and Georgia, have comprehensive laws relating to the manufacture, sale, possession and distribution of distilled spirits. Mississippi Code of 1942, Ch. 6 of Title 40, Sections 10265-01, et seq.; Code of Alabama, Title 29; Code of Georgia, Chapter 58.

Every aspect of the liquor business is covered by comprehensive state and federal statutes and regulations and subjects one engaged in the business to possible state and federal prosecution. The liquor business is "an area permeated with criminal statutes" and, we submit, those engaged in the business are a group "inherently suspect of criminal activities."

In view of what we have said, it is apparent that even if, under some circumstances, the manufacturing of

liquor were legal in every state, this would be no answer to the question posed. For instance, under Alabama statutes where only the State can manufacture liquor, had Appellants registered the distillery in Cleburne County, they would have, in effect, supplied the prosecuting officer with all of the information necessary to locate the distillery and the defendants. In addition, he would have a confession in the form of the application for registration, the registration and the bond.

In states such as Georgia and Tennessee (Tennessee Code 57-1101, et seq.), except in counties where manufacture of distilled spirits has been made lawful by local option vote, it is unlawful to manufacture distilled spirits. Such counties are generally referred to as "dry" counties. Thus, anyone who should register and bond a distillery in a "dry" county and thereby meet the requirements of 26 USC 5171, 5172, 5173 and 5179, would be inviting a state-court prosecution and offering a silver-platter conviction to the state.

The hazards of meeting the obligation to register and bond a distillery are not imaginary and unsubstantial. More than this, as in the case of wagering excise tax:

> "Although there is no statutory instruction . . . that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax. . . . We can only conclude that those liable for payment of the excise tax reasonably may expect that information obtainable from its payment . . . will ultimately be proffered to state and federal prosecuting authorities." *Grosso* v. *United States,* 390 U.S. 62, 66.

Accordingly, it may reasonably be assumed, as the Supreme Court assumed above, that information relative

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to the registration of distilleries and to the giving of a distiller's bond would ultimately find its way into the hands of a prosecuting attorney. The hazard of self-incrimination can readily be characterized as "real and appreciable." The claim of privilege to the entire registration, bonding and tax payment procedure is, therefore, neither "extreme" nor "extravagant."

Finally, the fact that a conspiracy is involved here, as opposed to substantive counts, is immaterial. If the privilege of self-incrimination is assertable with reference to the substantive offenses, it is equally available with reference to a conspiracy to violate the statutes in question. *Grosso* v. *United States*, supra.

Question Two

After the indictment was returned, but prior to trial, Petitioners' counsel went to the place of business of one Herrin, who was named as a co-conspirator, but not as a defendant in the indictment. The pre-arranged visit was for the purpose of interviewing Herrin as a potential witness, as indeed he was. Counsel was met at the entrance by an Internal Revenue Agent, who advised that Herrin could not be interviewed except in the presence of the United States Attorney or the local prosecuting attorney. Thus, an interview with Herrin was frustrated. A motion to suppress Herrin's testimony on this ground was overruled at the time of trial. In connection with this, Herrin testified that after he made the appointment for the interview, he contacted the Federal Agent who investigated the case and told him of the contact. He was told by the agent that if he "signed a paper" stating that he did not know Hutcheson, he would be perjuring himself. Accordingly, Herrin determined to refrain from the proposed interview. The agent who met counsel when he

attempted the interview was there at the request of Herrin.

A "government witness" is free to decide whether to cooperate with defense counsel prior to trial. *Byrnes* v. *United States,* 9 Cir., 327 F.2d 825. This decision must be free of coercion on the part of the government. In *Gregory* v. *United States,* D.C. Cir., 369 F.2d 185, the prosecutor's advice to his witnesses not to speak to anyone unless he was present was held to have effectively denied to defense counsel access to the witnesses and was unwarranted "suppression of the means by which the defense could obtain evidence." According to the undisputed facts in this record, counsel, under substantial disadvantage, was told by the government that he could "see" the witness only in the office of the local prosecuting attorney or the office of the United States Attorney. Even if this was intended to mean that counsel would be permitted to interview Herrin in the presence of Mr. Finch or the United States Attorney, this does not comport with Appellants' rights. Both sides in a criminal case have an equal opportunity to interview witnesses.

Question Three

During the cross-examination of Hutcheson, the District Attorney inquired of him as to prior convictions for felony offenses. It was developed that he had four prior convictions. On re-direct-examination, the conviction record was clarified to some extent. After re-cross-examination, the court inquired of Hutcheson as to how many times he had been convicted of "whiskey offenses". The court then asked how many of the convictions were for conspiracy. Following the reply that all four of his prior convictions were for conspiracy, the court asked whether his present co-defendant, Dryden, was "ever a

conspirator in those cases with you". An affirmative reply provoked the court to ask in how many of the prior cases was Dryden involved. The witness responded that Dryden was in two of the previous cases. The District Attorney then asked Hutcheson whether Godwin was a defendant along with him "in any of those conspiracy cases". He received an affirmative reply. While the court was examining Hutcheson, counsel refrained from objection; however, objection was interposed to the further interrogation along that line by the District Attorney.

Counsel requested the court to instruct the jury to the effect that evidence of the prior convictions was admissible solely for impeachment purposes. The court instructed the jury additionally, however, that the evidence could be considered "for whatever value (it) may be on the question of intent and guilty knowledge."

It is axiomatic that generally placing before the jury evidence of other crimes committed by an accused constitutes prejudicial error, whether or not they are of the same nature as the one charged in the indictment. *Duncan* v. *United States,* 5 Cir., 357 F.2d 195; *Bush* v. *United States,* 9 Cir., 267 F.2d 483; *Kraft* v. *United States,* 8 Cir., 238 F.2d 794; *Osborne* v. *United States,* 8 Cir., 351 F.2d 111; *White* v. *United States,* 4 Cir., 279 F.2d 740; *Helton* v. *United States,* 5 Cir., 221 F.2d 338. Even where admissible for some purpose other than impeachment, such evidence should be rejected or limited so as to avoid prejudice to the accused, where the resulting prejudice to the defendant greatly overbalances the slight probative value of the evidence. It is doubtful if a jury, even under the best instructions, will strictly confine the use of this kind of evidence to the issue of knowledge and intent and avoid the implication that the accused, having committed prior criminal acts, probably committed the one with which he is charged.

Question Four

It was the contention of Hutcheson that if he were a party to the Mississippi still conspiracy, he was not a party to the remaining conspiracy and was not connected with it. His criminal responsibility, if any, ceased with the termination of the abortive effort to erect a distillery in Mississippi. If this contention were accepted by the jury and it found that there were two conspiracies, albeit closely related, and that Hutcheson was not a party, except as to the Mississippi one, he would have been entitled to an acquittal. This is so for the reason that venue would not have been properly laid in the Middle District of Alabama.

Although requested to do so, the trial court refused to permit argument on this specific point and to charge the jury with reference to this specific contention.

We recognize the rule generally that where a single conspiracy is charged in the indictment and more than one is proved by the evidence, the variance is not necessarily fatal. In fact, it is fatal only when the substantial rights of the defendant are adversely affected. *Berger* v. *United States*, 295 U.S. 78; *Kotteakos* v. *United States*, 328 U.S. 750. However, if the contention of Hutcheson were accepted by the jury in this case, he would have been entitled to an acquittal; thus, the error in refusing to submit this factual issue to the jury was not harmless.

It has been uniformly held, prior to the decision of the Court of Appeals in the present case, that whether a scheme is a single overall conspiracy or several is primarily a jury question, depending upon the finding of the jury as to the agreement or agreements among the parties. *Lefco* v. *United States*, 3 Cir., 74 F.2d 66, 69; *Koolish* v. *United States*, 8 Cir., 340 F.2d 513, 526; *Hayes*

v. *United States*, 8 Cir., 329 F.2d 209, 214; *United States* v. *Crosby*, 2 Cir., 294 F.2d 928, 945; *United States* v. *Dardi*, 2 Cir., 330 F.2d 316, 327; *Green* v. *United States*, 5 Cir., 332 F.2d 788, 789. More recently, in *United States* v. *Varelli*, 7 Cir., 407 F.2d 735, 744, the Seventh Circuit gave a "full airing" to the "problems of multiple conspiracy litigation" and concluded as we urge here that the issue, when the possibility of a variance appears, should be submitted to the jury under proper instructions. That opinion, as well as those cited above, are in direct conflict with the opinion of the Fifth Circuit in the present case.

CONCLUSION

For the reasons submitted, it is respectfully urged that this petition for the writ of certiorari should be granted and that this Court should determine that the court below erred in the respects presented herein.

Respectfully submitted,

ROBERT B. THOMPSON
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Sam Alta Dryden and Ray Bueiew Hutcheson were deposited in the United States Post Office with air-mail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington, D. C., and to The Honorable Ira De-Ment, United States Attorney, Federal Building, Montgomery, Alabama.

This the 20th day of April, 1970.

ROBERT B. THOMPSON

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 27169

D. C. Docket No. 12,144-N
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SAM ALTA DRYDEN and RAY BUEIEW HUTCHESON,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Alabama

Before GEWIN, COLEMAN and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

March 23, 1970

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27169

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SAM ALTA DRYDEN and RAY BUEIEW HUTCHESON,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Alabama

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(March 23, 1970)

Before GEWIN, COLEMAN and DYER,
Circuit Judges.

GEWIN, Circuit Judge: Sam A. Dryden and Ray B. Hutcheson appeal from a conviction by a jury in the United States District Court for the Middle District of Alabama for conspiracy to violate revenue laws dealing with distilled spirits. They contend that the lower court erred in (1) overruling appellants' motion to dismiss the indictment, (2) overruling Hutcheson's motion for severance, (3) overruling appellants' motion to suppress the testimony of Robert Herrin, a government witness, (4) permitting the jury to consider Hutcheson's prior convictions in determining his intent and guilty

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knowledge, and (5) in failing to submit the issue of multiple conspiracy to the jury. These contentions are without merit; they are discussed in the order presented; the convictions are affirmed.

Appellants contend that the indictment should have been dismissed because compliance with the Internal Revenue laws relating to distilled spirits would have resulted in self-incrimination. In prosecuting this contention, appellants undertake a Sisyphean task. Hutcheson and Dryden were not convicted for failure to comply with the laws which they contend require self-incrimination. They were convicted of conspiracy in violation of Title 18 U.S.C. § 371. Thus, the threshold question is whether a defendant in a prosecution for conspiracy to violate certain laws can challenge the constitutionality of those laws. A discussion of this question would be purely academic. We have repeatedly held that registration and tax statutes governing distilleries do not impose the danger of self-incrimination.[1]

Hutcheson's motions for severance were predicated on his contentions that the indictment and proof showed two conspiracies, one in Mississippi and the other in Alabama; and that he was, at most, only involved in the former. Hutcheson argues that most of the evidence relates to Dryden's conspiracy in Alabama and that he suffered from guilt by association. The precise legal issue raised here is difficult to ascertain. A motion for severance, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, is addressed to the sound discretion of the trial court and a conviction will be reversed only if the

1. Wilson v. United States, 409 F.2d 604 (5th Cir. 1969); Thornburg v. United States, 406 F.2d 1060 (5th Cir. 1969); Anderson v. United States, 403 F.2d 206 (5th Cir. 1968). *See also*, United States v. Walden, 411 F.2d 1109 (4th Cir. 1969).

refusal of the trial court to grant the relief was a clear abuse of discretion.[2] Hutcheson states:

> It was and is the contention of Hutcheson that the evidence justified a finding that two conspiracies were established by the evidence.

Appellant is apparently saying that a district court abuses its discretion if it fails to grant a severance where there is sufficient evidence to support a jury's finding that two conspiracies existed instead of only one conspiracy as charged in the indictment. Hutcheson offers and we have been able to find no support for such a proposition.[3] In addition, we believe that the record may be fairly read to show only one conspiracy. There was no abuse of discretion.

Appellants allege that the district court erred in failing to suppress the testimony of Robert Herrin, a government witness. The testimony was improperly admitted, according to appellants, because government agents interfered with and prevented appellants' counsel from interviewing Herrin. Appellants point to two instances of interference: First, Treasury Agent Petre told Herrin not to sign a certain statement desired by appellant Hutcheson; second, Treasury Agent Berry told Hutcheson and his attorney that they could interview Herrin only in the

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2. *See* 1 C. Wright, Federal Practice and Procedure § 227 (1969).

3. Appellant's contention appears to be perversion of a "fatal variance" argument which we have repeatedly rejected. We have held that where an indictment charges one conspiracy and two or more are proved, if the defendant was guilty of at least one conspiracy, the variance is not fatal. Jolley v. United States, 232 F.2d 83, 88 (5th Cir. 1956), *followed in* Robinson v. United States, 333 F.2d 950 (5th Cir. 1964); Harlow v. United States, 301 F.2d 361 (5th Cir. 1962); Padgett v. United States, 283 F.2d 244 (5th Cir. 1960); Parmenter v. United States, 279 F.2d 151 (5th Cir. 1960). *See also*, Berger v. United States, 295 U.S. 78, 82 (1935); Kotteakos v. United States, 328 U.S. 750 (1945).

presence of the state or federal district attorney. Appellants argue that this conduct denied them the effective assistance of counsel and due process of law.[4] Examined in context, neither of these incidents amounts to unconstitutional interference.

The record reveals that Herrin's reluctance to be interviewed did not result from improper government influence but occurred because of Hutcheson's attempts to elicit a false statement from him. Government agents became involved and gave advice in the present case only at Herrin's insistence. Soon after the indictment against Hutcheson was returned, he telephoned Herrin and asked him to sign a false statement to the effect that he had never seen Hutcheson. Herrin, apparently intimidated by Hutcheson, promised to sign the statement; however, he immediately contacted Treasury Agent Petre, explained the situation and asked for advice. Herrin testified that Petre did not advise him not to talk with appellants or their attorneys but did mention that if Herrin signed the false statement, he would be committing perjury. Clearly, the agent overstated his point, but under the facts and in the circumstances, we think his remark amounted to nothing more than an admonition against signing a false statement. We find no constitutional violation because Petre gave this advice at Herrin's request after the witness had explained that the requested statement was false.

Appellants also complain of another incident. When Hutcheson and his attorney went to Herrin's store to obtain an interview, they were met by agent Berry. He explained that they would be allowed to talk to Herrin

4. To support this contention, appellants rely mainly on Gregory v. United States, 369 F.2d 185 (D. C. Cir. 1966) and Byrnes v. United States, 327 F.2d 825 (9th Cir. 1964).

only in the presence of the state or federal district attorney. Appellants rely heavily on *Gregory* v. *United States*[5] in arguing that the agent's conduct requires reversal. In that case, the D. C. Circuit overturned a murder conviction because the prosecutor had effectively prevented defense counsel from interviewing witnesses. The prosecutor told the witnesses not to talk to anyone about the case unless he was present. We are of the opinion that a fundamental difference exists between *Gregory* and the case before us. In the instant case, the federal agent was summoned by the witness. Herrin asked Berry to tell Hutcheson and his counsel that he (Herrin) did not wish to speak with them. Herrin clearly had a right to refuse to be interviewed.[6] If anything, the agent understated Herrin's position. He obviously did so to shift the blame for the abortive interview from Herrin to the district attorneys. These facts and circumstances can not support a finding of a constitutional violation in our judgment.

Appellants contend that the trial court erred in charging the jury that Hutcheson's prior criminal offenses could be considered for the purpose of determining his intent and guilty knowledge. We think this portion of the court's charge was proper, especially in light of Hutcheson's contention that he had no guilty intent or knowledge with respect to the whiskey transactions in Alabama. The Second Circuit correctly stated the applicable rule in *United States* v. *Klein*:

> Where, as here the evidence is susceptible of the interpretation that the acts alleged to constitute the crime were innocently performed and the vital issues of knowledge and intent are keenly disputed, it is well

5. 369 F.2d 185 (D. C. Cir. 1966).

6. A witness may refuse to be interviewed or dictate the circumstances under which he will submit to an interview. Byrnes v. United States, 327 F.2d 825 (9th Cir. 1964).

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within the trial judge's discretion to permit the Government, on a properly limited basis, to introduce evidence of prior similar offenses demonstrating the unlikelihood that the defendant was a mere innocent, unknowing bystander. For in such cases the jury must be relied upon not to convict the defendant solely because he is an evil fellow with a propensity towards criminal behavior in general . . . but because of the sheer improbability that a person with his familiarity and experience with the specific criminal conduct charged might have been unaware that a crime was being committed or might have performed the acts with an innocent and lawful intent.[7]

Hutcheson's final complaint raises again the multiple conspiracy theory. He insists that this question should have been submitted to the jury. His reasons are wantonly defective. Hutcheson explains that if the jury had found him guilty of conspiracy in Mississippi alone, he would have been entitled to a complete acquittal because venue for a crime committed in Mississippi would have been improper in the Middle District of Alabama. Defects relating to venue are waived unless asserted prior to trial.[8] Hutcheson made no such assertion.

Finally, the record convinces us that the guilt of the defendants was unquestionably established by clear and convincing proof. They received a fair trial and the judgment of conviction should be affirmed.

AFFIRMED.

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7. 340 F.2d 547, 549 (2d Cir. 1965). *See* United States v. Thune, 411 F.2d 620 (5th Cir. 1969); Mathews v. United States, 407 F.2d 1371, 1381 (5th Cir. 1969).

8. Harper v. United States, 383 F.2d 795 (5th Cir. 1967).